USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 4/4/17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PEDRO MUNIZ, *et al.*, Plaintiffs, -against- RE SPEC CORP. *et al.*, Defendants.	16-CV-02878 (BCM) **MEMORANDUM AND ORDER**

BARBARA MOSES, United States Magistrate Judge.

In this wage and hour case, before me for all purposes pursuant to 28 U.S.C. § 636(c), nine food service workers assert claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (FLSA), and New York Labor Law §§ 190 *et seq.* and 650 *et seq.* (NYLL), against the owners and operators of the restaurants where they were formerly employed. Defendants 3K Foods, Inc., d/b/a Jackson Hole (3K Foods), George Kalogeras, Thomas Kalogeras, and Dimitri Kalogeras (collectively the Moving Defendants) now seek leave to assert third-party claims against Octavio Gonzalez, the former day manager of one of their restaurants, who was also, briefly, a plaintiff in this action. The Moving Defendants allege that Gonzalez had various "supervisory and managerial responsibilities" as a "trusted employee of 3K Foods and the Kalogeras family," including the obligation to "conduct their business operations in accordance with federal and state law," such that if the Moving Defendants are liable to the plaintiffs under the FLSA or the NYLL, Gonzalez is liable to the Moving Defendants "for all or part of the plaintiffs' claims under federal and state law." Prop. Third-Party Compl. (Dkt. No. 66-1, at ECF pages 3-16), ¶¶ 3, 15-17.

For the reasons set forth in more detail below, the motion is DENIED. It is well-established in this Circuit that employers have no right to indemnification or contribution under either the FLSA or the NYLL. *See Herman v. RSR Sec. Servs.*, 172 F.3d 132 (2d Cir. 1999). A defendant employer may not evade that prohibition by seeking the same relief under a different label, such as breach of contract or breach of fiduciary duty. *See, e.g.*, *Gustafson v. Bell Atl. Corp.*, 171 F. Supp. 2d 311 (S.D.N.Y. 2001). The first three counts of the proposed third-party pleading plainly seek indemnification or contribution, albeit under a variety of labels, and therefore do not state any cognizable claim. To the extent the fourth count alleges an independent basis for liability, on a trade secrets theory, it runs afoul of the fundamental rule that a third-party claim must be "dependent on" or "derivative of" the main claim. *Bank of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 438 (2d Cir. 2000). Moreover, the Moving Defendants fail to allege any facts showing that they possessed, or Gonzalez disclosed, any protectable secrets.

BACKGROUND

Plaintiffs Pedro Muniz and Octavio Gonzalez commenced this action on April 18, 2016, alleging that they worked at two New York City restaurants operated by defendants under the name Jackson Hole, one on Madison Avenue and one on Columbus Avenue, and that their former employers violated the minimum wage, overtime, spread-of-hours, and recordkeeping provisions of the FLSA and NYLL. Compl. (Dkt. No. 1), ¶¶ 1-11, 16-25, 39, 63. On September 30, 2016, original plaintiff Muniz, joined by additional plaintiffs Alejandro Mendoza Jimenez, Armando de Jesus Sontay, Ismael Morales, Lucio Flores, Raul Sanchez Rufino, Rigoberto Andres Juarez, Teofilo Mendez, and Eustolio Aquino – but not original co-plaintiff Gonzalez – filed their First Amended Complaint, once again asserting wage and hour claims against Re Spec Corp. d/b/a Jackson Hole (Re Spec), 3K Foods, and George, Thomas, and Dimitri Kalogeras. *See* First Am. Compl. (Dkt. No. 38), ¶¶ 1-14. Plaintiffs allege that Re Spec operated the Columbus Avenue restaurant; that 3K operated the Madison Avenue location; that the individual defendants were the owners, officers, and/or agents of the corporate defendants; and that all defendants were "joint employers" of the plaintiffs within the meaning of the FLSA and the NYLL. *Id.* ¶¶ 26-33, 36-43.

On October 13, 2016, defendants moved to disqualify plaintiffs' counsel, the law firm of Michael Faillace & Associates, P.C. (the Firm), based on its representation of former plaintiff Gonzalez. (Dkt. No. 41.) Defendants argued, among other things, that the Firm had an "incurable" conflict of interest because Gonzalez had been the "day manager" at the Madison Avenue restaurant, with authority to hire and fire employees, grant time off, schedule breaks and meal periods, and supervise other employees, and as such could be liable to Muniz and the other present plaintiffs as an additional joint employer. *See* Decl. of George Kalogeras, filed Oct. 13, 2016 (Dkt. No. 42), ¶¶ 2(A)-2(B), 8, 10; Def. Mem. of Law, filed Oct. 13, 2016 (Dkt. No. 44), at 2, 7-8. Plaintiffs also argued that Gonzalez "could have been in possession of confidential information" which he improperly conveyed to the Firm, *see* Def. Mem. of Law, at 3; Kalogeras Decl. ¶ 29 ("I am deeply concerned that counsel possibly obtained confidential information from Mr. Gonzalez"). However, defendants did not describe any such information, even in general terms, and did not provide any supporting evidence. *See* Def. Mem. of Law at 12; Kalogeras Decl. ¶¶ 12, 29-33.

On January 19, 2017, the Court denied the disqualification motion. (Dkt. No. 57.) On January 30, 2017, defendants filed the instant motion (Dkt. No. 58), which they then refiled, on February 1, 2017, to correct certain technical deficiencies. (Dkt. No. 66.)

In their proposed Third-Party Complaint, the Moving Defendants allege that 3K Foods operated the Madison Avenue restaurant from approximately 1973 until it closed in 2013; that George and Thomas Kalogeras were shareholders, officers and directors of 3K Foods; that Dimitri Kalogeras was a "part time manager" for 3K Foods at unspecified times; and that

Gonzalez was "the manager" of the Madison Avenue location from 1988 to 2013. Prop. Third-Party Compl. ¶¶ 7, 10-12, 14.[1] As manager, Gonzalez "hired and fired employees, granted time off, scheduled breaks and meal periods, paid vendors, ordered supplies and in all other respects conducted the business of the restaurants [sic], including maintaining the books and records and employment records as a trusted employee of 3K Foods and the Kalogeras Family." *Id.* ¶ 15. Gonzalez also "determined employment policy and fixed the wages, hours and pay rates for the employees," *id.* ¶ 16, and, as a manager, "owed a fiduciary obligation to the corporation and the individual defendant's [sic] to conduct their business operations in accordance with federal and state law including the provisions of the FLSA, the NYLL and the 'Spread Hours [sic] Wage Order.'" *Id.* ¶ 17.

Although the Moving Defendants do not "conced[e] the truth of the factual allegations in the complaint," they simultaneously allege, on information and belief, that Gonzalez failed "on numerous occasions, and in violation of his fiduciary obligation to 3K and the Kalogeras defendant's [sic]," to comply with the FLSA and the NYLL "in his dealings with the plaintiffs." Prop. Third-Party Compl. ¶¶ 18-19. In particular, the Moving Defendants allege, Gonzalez committed all of the FLSA and NYLL violations alleged by all nine current plaintiffs in paragraphs 44-236 of the First Amended Complaint. *Id.* ¶¶ 20-28.[2] In Count I

---

[1] The motion to amend was filed by all five named defendants, including Re Spec, which operated the Columbus Avenue restaurant and never employed Gonzalez. *See* Not. of Mot. (Dkt. No. 66) at ECF page 1. However, it appears that the proposed third-party plaintiffs would be limited to 3K Foods (which operated the Madison Avenue restaurant, and did employ Gonzalez) and the individual defendants. *See* Prop. Third-Party Summons (Dkt. No. 66-1), at ECF page 1; Prop. Third-Party Compl., at ECF page 3.

[2] Six of those plaintiffs worked only at the Columbus Avenue restaurant. *See* First Amend. Compl. ¶¶ 18, 20-21, 23-25. Defendants do not explain how Gonzalez, who never worked at that location, could be responsible for wage and hour violations there. *See* Kalogeras Decl. ¶ 2(F) (arguing that former plaintiff Gonzalez lacked standing to sue Re Spec because "he never worked for that entity").

("Indemnification"), the Moving Defendants allege that since the "only basis" for imputing liability to them is "by virtue of the acts and/or omissions of the third-party defendant," they are entitled to indemnity from Gonzalez for any and all damages they are required to pay to plaintiff. *Id.* ¶¶ 29-33.

In Count II ("Breach of Fiduciary Duty"), the Moving Defendants allege that any violations of the FLSA or NYLL by Gonzalez also breached his fiduciary obligations to his own employers, that is, the Moving Defendants. Prop. Third-Party Compl. ¶¶ 34-52. In Count III ("Breach of Contract"), they allege that Gonzalez orally agreed to supervise the plaintiffs in compliance with federal and state law, such that any violations of the FLSA or NYLL by Gonzalez also breached his contractual obligations to the Moving Defendants. *Id.* ¶¶ 53-63. And in Count IV ("Breach of Fiduciary Relationship"), they allege that Gonzalez had a "duty of absolute loyalty" to them, which he breached by disclosing "confidential information and trade secrets to the plaintiffs' attorneys in the instant action." *Id.* ¶ 65, 72. Once again, however, the Moving Defendants do not describe – even in general terms – any of the confidential information or trade secrets allegedly disclosed. *See id.* ¶¶ 64-73.

In an accompanying declaration, defendant George Kalogeras attests that he was an "absentee owner/officer" of 3K Foods who left the "daily management and operation" of the restaurant "under the control of Mr. Gonzalez." Decl. of George Kalogeras, filed Feb. 1, 2017 (Dkt. No. 65), ¶ 4 (hereinafter the Second Kalogeras Decl.). According to Kalogeras, Gonzalez was the "direct supervisor" of the three plaintiffs who worked at the Madison Avenue location, and was responsible for, among other things, any wage and hour violations with respect to those plaintiffs. *Id.* ¶¶ 6-12. Kalogeras acknowledges that no effort was made to implead Gonzalez during an earlier FLSA lawsuit, brought by other employees at the same restaurant, nor at the outset of this case. *Id.* ¶ 13. He explains that he wanted to "protect" Gonzalez in the first lawsuit, because of his long service to the Kalogeras family, but changed his mind when Gonzalez "turns around and sues me!" *Id.* ¶ 16.[3]

Plaintiffs opposed the motion to amend on February 6, 2017 (Dkt. No. 67), and defendants filed a reply memorandum on February 24, 2017. (Dkt. No. 69.) Discovery closed on March 31, 2017. (Dkt. No. 57.)

ANALYSIS

I. Applicable Standards

Fed. R. Civ. P. 14(a)(1) permits a defending party to assert claims over against "a nonparty who is or may be liable to it for all or part of the claim against it." The third party's liability "must be dependent on, or derivative of," the main claim. *Bank of India*, 239 F.3d at 438 (citation omitted). "The secondary or derivative liability notion is central." 6 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* (hereinafter *Fed. Prac. & Proc.*) § 1446, at 415 (3d ed. 2010). Thus, impleader under Rule 14(a) may be successfully utilized only when the basis of the third-party claim is indemnity, contribution, subrogation, or some other theory that makes the third-party defendant's liability dependent on the outcome of the claim or claims against the third-party plaintiff. *Id.* at 415-21; *see also Siemens Westinghouse Power Corp. v. Dick Corp.*, 299 F. Supp. 2d 242, 248 (S.D.N.Y. 2004) ("[t]he outcome of the third-party claim must be *contingent* on the outcome of the main claim")

---

[3] The Second Kalogeras Declaration explains why Gonzalez was not impleaded in the earlier lawsuit. It does not, however, address the timing of the pending motion. Defendants made no effort to claim over against Gonzalez when he appeared as a plaintiff on April 18, 2016, nor when they answered the First Amended Complaint on October 11, 2016. They first attempted to bring Gonzalez into the case only after they made and lost their disqualification motion.

(quoting *Nat'l Bank of Can. v. Artex Indus., Inc.*, 627 F. Supp. 610, 613 (S.D.N.Y. 1985) (emphasis added)), *amended on other grounds*, 219 F.R.D. 326 (S.D.N.Y. 2004).

"'[T]he mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claims is not enough.'" *Eckhoff v. Wal-Mart Assocs., Inc.*, 2013 WL 6847117, at *2 (S.D.N.Y. Dec. 30, 2013) (quoting *Nat'l Bank of Can.*, 627 F. Supp. at 613); *see also* 6 *Fed. Prac. & Proc.* § 1446, at 432-34. The third-party claim "must derive from the main claim," and "'the claim of liability to the defendant and third-party plaintiff [must] accrue only upon a finding of defendant's liability to the plaintiff on the main claim.'" *Eckhoff*, 2013 WL 6847117, at *2 (quoting *Index Fund, Inc. v. Hagopian*, 417 F. Supp. 738, 744 (S.D.N.Y. 1976)). *See, e.g.*, *Kenneth Leventhal & Co. v. Joyner Wholesale Co.*, 736 F.2d 29, 31 (2d Cir. 1984) (per curiam) (affirming dismissal of third-party complaint where "the third party's liability here is neither dependent upon the outcome of the main claim nor is the third party potentially secondarily liable as a contributor to the defendant"); *Eckhoff*, 2013 WL 6847117, at *5 (dismissing third-party claim against NFI because NFI's alleged failure to insure defendant Wal-Mart against plaintiff Eckhoff's personal injury claim "in no way turns on whether [Wal-Mart] was negligent with respect to Mr. Eckhoff"); *Siemens Westinghouse*, 299 F. Supp. 2d at 249 (dismissing third-party complaint where third-party claims arose from same project as original complaint but were not contingent on its outcome); *iBasis Glob., Inc. v. Diamond Phone Card, Inc.*, 278 F.R.D. 70, 76-77 (E.D.N.Y. 2011) (denying Rule 14(a) motion where defendants, who stood accused of breach of contract, "do not allege that the [proposed third-party defendants] are in some way responsible for their alleged breach").

Where, as here, more than 14 days have elapsed since the filing of the answer, a defendant must obtain leave of the court before filing a third-party complaint. Fed. R. Civ. P.

14(a). Assuming that the proposed claims satisfy the "dependent on, or derivative of" requirement, "[t]he decision whether to permit a defendant to implead a third-party defendant rests in the trial court's discretion." *Kenneth Leventhal & Co.*, 736 F.2d at 31; *see also Cucchiara v. Hollingsworth*, 2016 WL 6068193, at *4 (S.D.N.Y. Oct. 14, 2016); *Nova Prods., Inc. v. Kisma Video, Inc.*, 220 F.R.D. 238, 240 (S.D.N.Y. 2004). The relevant factors for the court's consideration include:

> (i) whether the movant deliberately delayed or was derelict in filing the motion; (ii) whether impleading would unduly delay or complicate the trial; (iii) whether impleading would prejudice the third-party defendant; and (iv) whether the third-party complaint states a claim upon which relief can be granted.

Nova Prods., 220 F.R.D. at 240. *Accord Cucchiara,* 2016 WL 6068193, at *4; *iBasis Glob.,* 278 F.R.D. at 74; *Too, Inc. v. Kohl's Dep't Stores, Inc.*, 213 F.R.D. 138, 140 (S.D.N.Y. 2003). With regard to the last factor, the standard is the same as under Fed. R. Civ. P. 12(b)(6). *See, e.g.*, *Greene v. City of N.Y.*, 2010 WL 1936224, at *2-6 (E.D.N.Y. May 12, 2010). Thus, if a proposed third-party claim would not withstand a motion to dismiss made under Rule 12(b)(6), leave to assert that claim should not be granted under Rule 14(a). *Id.* (vacating magistrate judge's order granting leave to implead a third-party defendant, and dismissing third-party complaint, after determining that there is no right to indemnification or contribution under 42 U.S.C. § 1983 or related statutes); *see also* 6 *Fed. Prac. & Proc.* § 1446, at 435-36 ("[i]f, for example, the governing law does not recognize a right to contribution or indemnity, impleader for these purposes cannot be allowed").

II. The Motion Was Not Timely Filed

The timing of defendants' Rule 14(a) motion raises serious questions as to whether they "deliberately delayed or [were] derelict" in filing it." *Nova Prods.*, 220 F.R.D. at 240. As noted above, defendants made no effort to claim over against Gonzalez when the original Complaint was filed, nor to implead him when they answered the First Amended Complaint. This was not for want of information. No investigation was required for them to discover the factual basis for their proposed third-party claims, which is simply that Gonzalez managed the Madison Avenue restaurant and supervised the employees there. Nor were defendants required to look beyond the original Complaint to determine that (as George Kalogeras put it) Gonzalez had "turn[ed] around and sue[d] me!" Second Kalogeras Decl. ¶ 16.

Nonetheless, defendants did not seek leave to implead Gonzalez until they first made and lost a motion to disqualify plaintiffs' counsel. Moreover, it is apparent from defendants' reply memorandum that their third-party claims are intended, at least in part, to revive their motion to disqualify plaintiffs' counsel. In that memorandum defendants argue that the Firm, simply by opposing the Rule 14(a) motion, "raises anew, substantial questions as to counsel's conflict of interest in this matter." Def. Reply Mem. of Law at 2. Defendants then explicitly ask this Court to "revisit" its January 19, 2017 decision and grant their disqualification motion in light of "the situation now presented." *Id.* at 7-9. Leaving aside defendants' apparent disregard for Local Civil Rule 6.3 (governing motions for reconsideration), the tactical use of a belated Rule 14(a) motion in an effort to breathe new life into a previously-denied attorney disqualification motion does not militate in favor of granting that motion.

Even if defendants had moved promptly to implead Gonzalez, however, the Court would deny the motion, because the proposed pleading would not withstand a motion to dismiss under Rule 12(b)(6).

III. Counts I-III Fail To State A Claim Upon Which Relief Can Be Granted

The law in this Circuit is clear: "There is no right of contribution or indemnification for employers found liable under the FLSA." *Herman*, 172 F.3d at 144 (affirming dismissal of third-party claims and cross-claims asserted by chairman and co-owner of defendant corporation against co-owner and other officers). As the Court of Appeals explained:

> The reasons are readily apparent. First, the text of the FLSA makes no provision for contribution or indemnification. Second, the statute was designed to regulate the conduct of employers for the benefit of employees, and it cannot therefore be said that employers are members of the class for whose benefit the FLSA was enacted. Third, the FLSA has a comprehensive remedial scheme as shown by the express provision for private enforcement in certain carefully defined circumstances. Such a comprehensive statute strongly counsels against judicially engrafting additional remedies. Fourth, the Act's legislative history is silent on a right to contribution or indemnification. Accordingly, we hold that there is no right to contribution or indemnification for employers held liable under the FLSA.

Id. (internal quotations and citations omitted). Thus, whether or not Gonzalez would qualify as an additional "joint employer" under the FLSA's "economic reality" test, *see id.* at 139, the existing defendants cannot seek indemnity or contribution from him with respect to their own potential FLSA liability. "The Second Circuit has made clear that an employer charged with violating the FLSA has no right to seek contribution from an employee who is alleged to have supervisory authority over his fellow plaintiff-employees." *Flores v. Mamma Lombardis of Holbrook, Inc.*, 942 F. Supp. 2d 274, 277 (E.D.N.Y. 2013) (citing *Herman*, 172 F.3d at 143). "This is true even if the employee from whom contribution is sought does, in fact, have responsibilities that would otherwise fit the statutory definition of an employer." *Id.* (citing *Herman*, 172 F.3d at 144-45).

Indemnity and contribution claims are also barred under state law. *See Herman*, 172 F.3d at 144 (noting in *dicta* that "the FLSA's remedial scheme is sufficiently comprehensive as to preempt state law in this respect"); *Flores*, 942 F. Supp. at 278 ("this court joins others within this circuit and holds that the same reasoning [set forth in *Herman*] bars such claims under the New York Labor Law"). *Accord Goodman v. Port Auth. of N.Y. & N.J.*, 850 F. Supp. 2d 363, 389 (S.D.N.Y. 2012) (dismissing cross-claim "for contractual indemnification for claims brought under the FLSA and New York Labor Law"); *Ansoumana v. Gristedes Operating Corp.*, 2003 WL 30411, at *1 (S.D.N.Y. Jan. 3, 2003) ("[n]either the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, nor the New York Minimum Wage Act, §§ 650-665, provides for contribution or indemnification and, it appears, no such right is recognized"); *Gustafson*, 171 F. Supp. 2d at 328 n.8 (the reasoning of *Herman* "holds for similar provisions of New York Labor Laws").

The first three counts of the proposed Third-Party Complaint all seek indemnity or contribution from Gonzalez under both the FLSA and the NYLL. Count I does so explicitly. *See* Prop. Third-Party Compl. ¶ 33 ("defendants are entitled to indemnity from the third-party defendant for any and all damages the defendants are required to pay to plaintiffs"). Counts II and III bear different labels but in substance are equally clear. In each count the Moving Defendants allege, "[w]ithout conceding the truth of the factual allegations in the Amended Complaint," that Gonzalez committed the very acts of which they stand accused, and therefore that Gonzalez is liable to them for "breach of fiduciary duty" or "breach of contract." *See id.* ¶¶ 36-52, 56-63.

The Moving Defendants cannot save their indemnity claim by recasting it in this manner. As Judge Conner explained in *Gustafson*, "Defendants' attempt to characterize their claim as a request for breach of contract damages rather than an action for indemnification under the FLSA is unpersuasive. Whether or not [third-party defendant] JAG breached a contractual obligation, defendants' attempt to recover damages from JAG for overtime violations is an attempt to receive indemnification for FLSA liability." 171 F. Supp. 2d at 328. Similarly, in *Finke v. Kirtland Cmty. Coll. Bd. of Trs.*, 359 F. Supp. 2d 593 (E.D. Mich. 2005), where the plaintiff sued a community college for FLSA violations, the court dismissed defendant's third-party claims against the administrator who allegedly supervised the plaintiff and was responsible for the

FLSA violations. Count I of the third-party complaint alleged an express claim for indemnity. Counts II and III alleged that the administrator breached his contractual and fiduciary obligations to the college when he violated the FLSA. *Id.* at 595. The court dismissed all three counts:

> No matter the label or the underlying legal theory put forth, the action can only be construed in this light as one for contribution or indemnity, which, the Court determines, is not allowed under the FLSA.

Id. at 601.

Here too, Counts II and III of the proposed Third-Party Complaint seek, in substance, indemnification or contribution from Gonzalez for defendants' potential liability under the FLSA and the NYLL. Like Count I, therefore, they are barred, as a matter of law, by *Herman* and its progeny.

IV. Count IV Is Not Dependent On The Main Claim And Fails To State A Claim Upon Which Relief Can Be Granted

In Count IV, the Moving Defendants allege that Gonzalez breached his fiduciary duties to them by improperly disclosing "confidential information and trade secrets" to plaintiffs' counsel. Prop. Third-Party Compl. ¶ 72. Whether Gonzalez made improper disclosures to the Firm is a very different question from whether defendants underpaid plaintiffs in violation of the federal and state wage and hour laws. The two claims do not even "arise[ ] from the same transaction or set of facts." *Eckhoff*, 2013 WL 6847117, at *2. More importantly, Gonzalez's potential liability for disclosing confidential information "is neither dependent upon the outcome of the main claim nor is the third party potentially secondarily liable as a contributor to the defendant." *Kenneth Leventhal & Co.*, 736 F.2d at 31. Under Rule 14(a), the third-party defendant's liability to the third-party plaintiff must "accrue only upon a finding of defendant's liability to the plaintiff on the main claim.'" *Eckhoff*, 2013 WL 6847117, at *2 (quoting *Index Fund*, 417 F. Supp. at 744). Here, a finding that 3K Foods or the Kalogeras defendants violated the FLSA or NYLL would say nothing about whether Gonzalez violated his alleged fiduciary duty to preserve his former employer's secrets. Therefore, even if Count IV were otherwise cognizable, it could not be pursued by means of a third-party complaint in this action.

Count IV is also deficient because it lacks factual support. "To state a claim for misappropriation of a trade secret or confidential information, a plaintiff must show: '(1) that it possessed a trade secret [or confidential information], and (2) that the defendants used that trade secret [or confidential information] in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means.'" *Dorset Indus., Inc. v. Unified Grocers, Inc.*, 893 F. Supp. 2d 395, 410 (E.D.N.Y. 2012) (quoting *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 117 (2d Cir. 2009) (bracketed language in the original). *Accord Big Vision Private Ltd. v. E.I. DuPont De Nemours & Co.*, 1 F. Supp. 3d 224, 257 (S.D.N.Y. 2014) (quoting *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 43-44 (2d Cir. 1999)). To survive a motion to dismiss, the claimant must describe the alleged secret with "sufficient particularity" to allow the defendant to defend himself. *See Big Vision*, 1 F. Supp. 3d at 258 (collecting cases). The complaint (in this case, the third-party complaint) must also plausibly allege that the information in question is in fact a "secret," or sufficiently "confidential," to warrant protection. *Id.*; *see also Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 407, 604 N.Y.S.2d 912, 918 (1993) ("a trade secret must first of all be secret").[4]

---

[4] In order to determine whether allegedly confidential information merits protection under New York law, the court considers the following factors: "(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Ashland Mgmt.*, 82 N.Y.2d at 407, 604 N.Y.S.2d at 918 (quoting Restatement (First) of Torts § 757, comment b (Am. Law Inst. 1939)).

Nowhere in their proposed pleading do the Moving Defendants describe the "trade secrets" or "confidential information" that they allegedly possessed and that Gonzalez allegedly disclosed to the Firm. It is not merely detail that is lacking; they do not even hint at the nature of the information they seek to protect. Nor do they provide any facts from which the Court could determine whether that information merits legal protection. They do not, for example, describe what measures were taken to safeguard the information; whether those measures included any confidentiality instructions or warnings to Gonzalez (they implicitly acknowledge that he had no written employment agreement, *see* Prop. Third-Party Compl. ¶ 54); who else had access to the same information; how difficult it would be for another person to develop or acquire it by lawful means; or what its value was, at the time of the alleged disclosure, to defendants' business.[5] The allegations concerning Gonzalez's supposed misuse of such information are equally lacking. The Moving Defendants simply assert, without further explanation, that Gonzalez had a "duty of absolute loyalty" to his former employer, *id.* ¶ 65, which he breached by divulging unspecified information, at an unspecified time, to the lawyers now representing plaintiffs herein, causing unspecified damages. *Id.* ¶¶ 72-73.

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556

---

[5] It is not obvious (at least to the Court) that *any* of the knowledge acquired in the ordinary course by the day manager of a now-shuttered restaurant would qualify as "confidential" or "trade secret" information, the disclosure of which could violate New York common law. *See Colonize.com, Inc. v. Perlow*, 2003 WL 24256576, at *6 (N.D.N.Y. Oct. 23, 2003) ("Absent any wrongdoing that would constitute a breach under [a] non-compete agreement, mere knowledge of the intricacies of a business is simply not enough" to make out a misappropriation claim) (citing *Catalogue Serv. of Westchester, Inc. v. Henry*, 107 A.D.2d 783, 784, 484 N.Y.S.2d 615, 616 (2d Dep't 1985); *see also ENV Servs., Inc. v. Alesia*, 10 Misc. 3d 1054(A), at *5, 809 N.Y.S.2d 481 (Table) (N.Y. Sup. Ct., Nassau Co. 2005) (information about other employees, such as "salary information, information about employee morale and information about employee qualifications, do[es] not fall within the definition of 'trade secret'").

U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "[A]lthough 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' is inapplicable to legal conclusions, and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Harris v. Mills,* 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678) (second alteration in the original). The allegations in Count IV of the proposed Third-Party Complaint do not even rise to the level of "threadbare."

CONCLUSION

Counts I-III of the proposed Third-Party Complaint fail to state any claim upon which relief can be granted. Count IV cannot be asserted as a third-party claim because it is not derivative of the plaintiffs' claims against the Moving Defendants, and in any event it also fails to state a cognizable claim. The motion for leave to file the Third-Party Complaint must therefore be DENIED. This Memorandum and Order resolves Dkt. No. 66.

Dated: New York, New York
April 4, 2017

SO ORDERED.

BARBARA MOSES
United States Magistrate Judge